IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
V.	)	
	)	ID No.: 1703020418
KWAME D. LOFLAND	)	
Defendant	)	

Submitted: October 10, 2018
Decided: February 1, 2019

On Defendant's Motion for Postconviction Relief.
DENIED.

ORDER

This 1st day of February, 2019, upon consideration of Defendant's Motion for Post Conviction Relief, it appears to the Court that:

1. On October 10, 2018, Defendant Kwame Lofland filed a Motion for Post Conviction Relief under De. R. Crim. P. Rule 61. This is a *pro se* pleading. He also requested the appointment of counsel. The answer to whether he is entitled to appointed counsel is tied to the underlying merits of his motion, which in turn is governed by Rule 61(e)(3).

2. Under the Rule, counsel "may" be appointed if the motion seeks to set aside the finding of guilt and 1) the conviction has been affirmed on appeal or an appeal is not available, 2) it sets forth a substantial claim of ineffective assistance by

counsel, 3) granting the motion would result in vacation of the judgment and 4) "specific and exceptional circumstances" warrant the appointment of counsel.

3. Lofland's motion recites that his conviction was affirmed on appeal.[1] This is his first motion for relief under Rule 61. If his motion were granted, his case would proceed to trial, or perhaps a different guilty plea. So the questions remaining for the Court are 1) whether his claims of ineffective assistance are "substantial" and 2) whether the claims set forth "specific and exceptional" circumstances warranting relief.

4. Turning to his motion, Lofland says counsel was ineffective because he filed a "meritless" suppression motion that was not "well-articulated" and further "didn't fully investigate the case." Second, Lofland claims a denial of his right to confront witnesses because counsel failed to file a motion to reveal the confidential informant that allegedly sent the police to him in the first place. Finally, there is a complaint that counsel failed to file a speedy trial motion, essentially denying his speedy trial rights.

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[1] *See* D.I. 37. Actually, the Supreme Court docket reflects that his appeal was voluntarily dismissed by Mr. Lofland. Whether abandonment of an appeal constitutes a waiver of rights under Rule 61 is one of those interesting questions that will be left for another day, since the motion will be denied on other grounds.

5. Taking the last first, we are reminded that a defendant raising a speedy trial argument must demonstrate that "but for the professional errors of his counsel, the outcome of the proceedings would probably have been different."[2]

6. Here, Defendant was arrested in March, 2017 and his case arrived in Superior Court in April, 2017. His trial would have been held in October, 2017, but both the prosecutor and defense attorney were scheduled to be in a different trial that date. A continuance request was granted by the Court. Shortly thereafter, the prosecution advised the Court that the investigating officer was unavailable for the rescheduled proceedings because he had been shot and was on disability with an uncertain return date.[3] That requested rescheduling was also approved by the Court. By January, 2018, the officer was back on the job and the suppression hearing proceeded on February 2, 2018.[4] The motion to suppress was denied and defendant pled guilty 4 days later.[5] Thus, the time from arrest to resolution was approximately 11 months and a rescheduling from late October, 2017 to February, 2018 was necessitated by an essential witness' unavailability due to having suffered a gunshot

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[2] *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *State v. Johnson*, 2002 WL 13-537 (Del. Super. 2002) (9 month delay in trial insufficient to implicate speedy trial rights, counsel not ineffective for failing to file).

[3] D.I. 16.

[4] D.I. 24.

[5] D.I. 27.

wound. Even if we attribute that delay to the State, Defendant has not come close to stating a case for denial of his right to a speedy trial.[6] Because a motion to dismiss for lack of a speedy trial would have been denied had it been made, counsel cannot be deemed ineffective for having failed to raise the issue.

7. Lofland complains that his counsel did not file a motion to reveal the identity of the confidential informer in his case. In Delaware, this is called a "*Flowers*" motion, seeking to determine whether the informant has information that is helpful to a defendant such that his identity must be revealed so he can be called as a witness in aid of the defense.[7] In the storied *Flowers* decision, Judge Quillen spelled out the four categories of information an informant might provide that could bear on his identity being revealed to the defense: (1) The informer is used merely to establish probable cause for a search (2) The informer witnesses the criminal act (3) The informer participates but is not a party to the illegal transaction (4) The informer is an actual party to the illegal transaction.[8]

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[6] *Barker v. Wingo*, 407 U.S. 514, 530 (U.S. 1972) (the 4 factors in a speedy trial analysis are (1) length of the delay, (2) reasons for the delay, (3) defendant's assertion of the right and (4) prejudice to the defendant). "Unless the delay was lengthy enough to be presumptively prejudicial, there is no need to inquire into the remaining factors." *Hicks v. State,* 26 A.3d 214, 2011 WL 2937393 (Del. Supr. 2011). Here the delay was modest, the reasons were benign, and defendant suffered no prejudice. *Id.* at *2 (one year from arrest to trial not presumptively prejudicial). *Accord, Blenman v. State*, 134 A.3d 769, 2016 WL 889551 at *3 (Del. Supr. 2016) ("Unless the delay is lengthy enough to be presumptively prejudicial, there is no need to inquire into the remaining factors.").

[7] *State v. Flowers*, 316 A.2d 564 (Del. Super. Ct. 1973).

[8] *Id.* at 5

8. In this case, Lofland maintains that the informant tip was "unreliable, was not based on personal knowledge of the officer but Counsel failed to file [a] motion to reveal "CI" or any motion of that nature to attack that issue to help the defense."

9. Lofland's informant in this case fits into the first category – the informant was used to establish probable cause. When the informant is merely used to establish probable cause, the presumption is that his identity need not be revealed to the defense. In this record, it is clear that the informant told a probation officer that "Maybach" was dealing drugs in Riverside and confirmed from a photograph that "Maybach" was Lofland. From there, officers drove around Riverside until they found Lofland, who was on probation and subject to a 7 p.m. curfew, out after 7 p.m. The evidence against Lofland was discovered pursuant to an administrative warrant authorized by the Probation Office after he was found outdoors after curfew with over $700 cash in his pocket. An administrative warrant for a probation search may be authorized by "reasonable suspicion," a lower standard than probable cause. There is no reason to believe that a *Flowers* motion would have resulted in revelation of identity of the informant, or that the informant's identity, once revealed, would have resulted in suppression of evidence or undermine confidence in Defendant's direct, in court admission of his guilt. Under these circumstances, the Court will not

infer or presume prejudice to the Defendant by counsel's failure to file a *Flowers* motion, which in all likelihood would have been denied anyway.

10. Finally, Defendant claims that the suppression motion that was heard and denied was "meritless" and "not well investigated" and that counsel "failed to conduct a reasonable investigation to prepare for suppression hearing or trial and didn't fully investigate case."

11. What happened after stopping Lofland in Riverside after curfew that brought him to court was this: Once probation secured authorization to conduct an administrative search, they went to his residence and found a handgun and a substantial quantity of packaged narcotics. These items were turned over to the Wilmington Police. The rest, as they say, is history.

12. While Defendant's characterization of the suppression motion as "meritless" seems a bit harsh, the facts are pretty straightforward, at least from the standpoint of the Fourth Amendment. Under these facts, Defendant's suppression case was "iffy" at best. He was a level 3 probationer with a curfew. He was out after curfew. Fourth Amendment rights are quite limited in such circumstances.[9]

12. Moreover, as a person prohibited from possessing a gun, and a habitual offender, the Defendant's jeopardy was quite severe. At final case review on May

[9] *See, e.g., Fuller v. State*, 844 A.2d 290, 292 (Del. Supr. 2004) (probation searches may be based on less than probable cause, so long as they adhere to state regulations); *Culver v. State*, 956 A.2d 5, 10-11 (Del. Supr. 2008) (discussing state administrative regulations for probation searches).

2, the rejected plea offer called for 25 years in prison. By May 5, the offer that was ultimately accepted called for the parties to agree to a 10-year jail sentence – which was the sentence finally imposed by the Court. Securing this deal required convincing the State to withdraw a potential habitual petition on the weapons offense. The Court cannot be blind to the fact that the Defendant, through his attorney, secured substantial benefits by virtue of the motion that he now calls "meritless."

13. We set out on this journey recalling that the criteria for the appointment of counsel included the necessity of finding that the guilty plea movant has set forth a "substantial claim" that he received ineffective assistance of counsel. Having reviewed the claims of the movant, the Court has found them to be insubstantial. This alone renders his request for counsel unavailing.

14. In addition, the Court has found nothing in the pleading that demonstrates "specific exceptional circumstances," also a necessary precondition to the appointment of counsel under Rule 61(e)(3). The Defendant was a probationer whose home was searched pursuant to an administrative warrant, guns and drugs were found. He pled guilty to reduced charges and received a reduced sentence. It is a story told with monotonous regularity in courthouses all over the country and is completely unexceptional. Lofland has not stated any circumstances making this

case an exception that would warrant appointment of counsel to represent him in this matter.

For the foregoing reasons, Defendant's Motion for Post-Conviction Relief is Denied.

IT IS SO ORDERED.

Charles E. Butler, Judge